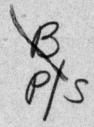
## United States Court of Appeals for the Second Circuit



### INTERVENOR'S BRIEF

# 76-4054



#### United States Court of Appeals

FOR THE SECOND CIRCUIT

RCA GLOBAL COMMUNICATIONS, INC.,

Petitioner,

-against-

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents,

and

ITT WORLD COMMUNICATIONS INC., TRT TELECOMMUNICATIONS CORPORATION and WESTERN UNION INTERNATIONAL, INC.,

Intervenors.

ON PETITION FOR REVIEW OF REPORT, OPINIONS AND ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

### SUPPLEMENTAL BRIEF AFTER REMAND OF INTERVENOR ITT WORLD COMMUNICATIONS INC.

LeBoeuf, Lamb, Leiby & MacRae
Attorneys for Intervenor
ITT World Communications Inc.
Office and P.O. Address
140 Broadway
New York, New York 10005
(212) 269-1100

Of Counsel:

Grant S. Lewis,
John S. Kinzey,
and
Howard A. White,
John A. Ligon,
ITT World Communications Inc.
67 Broad Street
New York, New York 10005
(212) 797-3300

March 20, 1978



#### TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	. i
ISSUE PRESENTED FOR REVIEW	. 2
STATEMENT OF THE CASE	. 3
A. Background	. 3
B. The FCC's Initial Order	. 9
C. Prior Proceedings in this Court	. 14
D. The FCC's Order on Remand	. 19
ARGUMENT	. 29
Point I: The FCC Properly Found That The New Formula Was In The Public Interest	. 29
A. The FCC's Decision that the Competitive Incentives of the New Formula Will Promote the Public Interest is a Policy Decision Which the FCC Properly Made on the Basis of its Expert Knowledge of the Communications Industry	. 30
B. The Court Should Reject RCA Globcom's Suggestion That It Substitute Its Own Assessment of the Public Interest For the Judgment of the Commission	. 40
Point II: The New Formula Is Justified On the Additional Ground That It Is More Equitable Among the Carriers Than the Old Formula	. 47
Point III: On Remand, the FCC Properly Followed The Procedures Which the Court Had Suggested	. 51
CONCLUSION	. 54

#### TABLE OF AUTHORITIES

A. <u>Judicial Decisions</u>	
Alabama Power Co. v. F.P.C., 482 F.2d 1208 (5th Cir. 1973) 41	
Allianza Federal de Mercedes v. F.C.C., 539 F.2d 732 (D.C. Cir. 1976)	
American Telephone & Telegraph Co. v. F.C.C.,  F.2d (2nd Cir. 1978) (Docket  No. 77-4057, decided January 26, 1978)	
American Telephone & Telegraph Co. v. F.C.C., 539 F.2d 767 (D.C. Cir. 1976)	
Bell Telephone Co. of Pa. v. F.C.C., 503 F.2d 1250 (3rd Cir. 1974), cert. den., 422 U.S. 1026 (1975)	
Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974)	
Camp v. Pitts, 411 U.S. 138 (1973)	
Carroll Broadcasting Co. v. F.C.C., 258 F.2d 440 (D.C. Cir. 1958)	
Cir. 1967), cert. den., 390 U.S. 945 (1968) 51	
Consolidated Edison Co. v. Labor Board, 305 U.S. 197 (1938)	
Consolo v. F.M.C., 383 U.S. 607 (1966)	
Cornell University v. United States, 427 F.2d 680 (2nd Cir. 1970)	
Denver & R.G.W.R. Co. v. United States, 387 U.S. 485 (1967)31	

	Page
Deutsch v. A.E.C., 401 F.2d 404 (D.C. Cir. 1968)	42
Diamond Ring Ranch, Inc. v. Merton, 531 F.2d	42, 42
Eastern Airlines, Inc. v. C.A.B., 271 F.2d 752 (2nd Cir. 1959), cert. den., 362 U.S. 970 (1960)	33
Environmental Defense Fund, Inc. v. E.P.A., 510 F.2d 1292 (D.C. Cir. 1975)	51
F.C.C. v. Pottsville Broadcasting Co., 309 U.S.	30
F.C.C. v. RCA Communications, Inc., 346 U.S. 86 (1953)	32-34, 36, 37
F.C.C. v. Sanders Bros. Radio Station, 309 U.S. 470 (1940)	43
F.M.C. v. Svenska Amerika Linien, 390 U.S. 238	31
F.P.C. v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1 (1961)	35
General Telephone Co. of Southwest v. United States, 449 F.2d 846 (5th Cir. 1971)	33, 35
Greater Boston Television Corp. v. F.C.C., 444 F.2d 841 (D.C. Cir. 1970), cert. den., 403 U.S. 923 (1971)	51
Gross v. F.C.C., 480 F.2d 1288 (2nd Cir. 1973)	52
Gulf States Utilities Co. v. F.P.C., 411 U.S. 747	31
Hawaiian Telephone Co. v. F.C.C., 498 F.2d 771 (D.C. Cir. 1974)	34
Western Ry. Co., 385 U.S. 57 (1966)	41, 42
1cLean Trucking Co. v. United States, 321 U.S. 67 (1944)	21

	Page
Mt. Mansfield Television, Inc. v. F.C.C., 442 F.2d 470 (2nd Cir. 1971)	30
National Association of Independent Television Producers and Distributors v. F.C.C., 516 F.2d 526 (2nd Cir. 1975)	20 25 25
National Association of Motor Rus Owners :	
F.C.C., 460 F.2d 470 (2nd Cir. 1971)	30
National Broadcasting Co. v. United States, 319 U.S. 190 (1943)	31
National Nutritional Foods Ass'n. v. Weinberger, 512 F.2d 688 (2nd Cir. 197), cert. den.,	
423 0.5. 827 (1975)	40
Neckritz v. F.C.C., 502 F.2d 411 (D.C. Cir. 1974)	52
North Carolina Utilities Comm'n. v. F.C.C., 552 F.2d 1036 (4th Cir. 1977), cert. den., U.S. (1977)	35
Permian Basin Area Rate Cases, 390 U.S. 747 (1968)	
Radio Relay Corp. v. F.C.C., 409 F.2d 322	29
(2nd Cir. 1969)	30
RCA Global Communications, Inc. v. F.C.C., 559 F.2d 881 (2nd Cir. 1977), On rehearing	
303 F.2d T (2nd Cir. 1977)	2, 14-19, 24 29, 48, 50
Trans-America Van Service, Inc. v. United States, 421 f. Supp. 308 (N.D. Tex. 1976)	33
United States v. Radio Corp. of America, 358 U.S. 334 (1959)	31
Universal Camera Corp. v. N. I. P. P. 340 H. C. 474	
(1551)	42
Washington Utilities & Transportation Commission  v. F.C.C., 513 F.2d 1142 (9th Cir. 1975),	
cert. den., 423 U.S. 836 (1975)	33. 51

	Page
WBEN, Inc. v. United States, 396 F.2d 601 (2nd Cir. 1968), cert. den., 393 U.S. 914 (1968)	36
WEBR, Inc. v. F.C.C., 420 F.2d 158 (D.C. Cir. 1969).	41
Western Union Division v. United States, 87 F. Supp. 324 (D.D.C. 1949), aff'd., 338 U.S. 864 (1949)	51
Western Union International, Inc. v. F.C.C.,  544 F.2d 87 (2nd Cir. 1976), cert. den.,  U.S. (1977)	2, 3
C.A. White Trucking Co. v. United States, 555 F.2d 1260 (5th Cir. 1977)	41
Widing Transportation, Inc. v. F.C.C., 545 F.2d 652 (9th Cir. 1976), cert. den., U.S. (1977)	41
WLVA, Inc. (WLVA-TV), Lynchburg, Va. v. F.C.C., 459 F.2d 1286 (D.C. Cir. 1972)	43
B. Decisions of the Federal Communications Commission  Application for Merger of the Western Union Telegraph Co. and Postal Telegraph, Inc.	<u>n</u>
10 F.C.C. 184 (1943)	5-6, 8 12
The Western Union Telegraph Co., 25 F.C.C.  35 (1958), rev'd. in part, sub nom. Western Union Telegraph Co. v. United States, 267 F.2d 715 (2nd Cir. 1959)	8
C. Statutes	
Administrative Procedure Act 5 U.S.C. §706(2)(A)	40

		Page	
Communications 47 U.S.C.	\$204 \$222 \$222(c)(2) \$222(e) \$222(e)(1) \$222(e)(3) \$222(e)(4)	44 44 6, 18 4 5 5 6, 15, 5	47, 50
D. <u>Legislative</u>	History		
89 <u>Congressiona</u> (February 18,	al Record 1092, 1145	6	

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4054

RCA GLOBAL COMMUNICATIONS, INC.,

Petitioner,

- against -

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents,

- and -

ITT WORLD COMMUNICATIONS INC.,
TRT TELECOMMUNICATIONS CORPORATION and
WESTERN UNION INTERNATIONAL, INC.,

Intervenors.

On Petition for Review of Report, Opinions and Orders of the Federal Communications Commission

SUPPLEMENTAL BRIEF AFTER REMAND OF INTERVENOR ITT WORLD COMMUNICATIONS INC.

Intervenor ITT World Communications Inc. ("ITT Worldcom") submits this post-remand brief in opposition to the Petition for Review of RCA Global Communications, Inc. ("RCA

Globcom"), which asks the Court to reverse three orders\* of respondent Federal Communications Commission ("FCC" or the "Commission") that prescribe a new "International Formula" for the division of outgoing international telegrams among ITT Worldcom, RCA Globcom, and the other competing international record carriers ("IRCs").

#### ISSUE PRESENTED FOR REVIEW

In its decision on rehearing, RCA Global Communications, Inc. v. F.C.C., 563 F.2d 1, 3 (2nd Cir. 1977) (SJA-1,

<sup>\*</sup> The three orders at issue are:

<sup>(</sup>a) a Report, Order and Notice of Proposed Rule-making (the "Initial Order"), 57 F.C.C. 2d 190 (1976) (JA-1-36, SJA-1121-47), released by the FCC on January 7, 1976;

<sup>(</sup>b) a Memorandum Opinion and Order (the "Reconsideration Order"), 61 F.C.C. 2d 183 (1976) (JA-70-84), which was released by the FCC on September 27, 1976 and which denied petitions for a stay and for reconsideration of the Initial Order; and

<sup>(</sup>c) a further Memorandum Opinion and Order (the "Order on Remand") FCC 77-805, F.C.C. 2d (1978) (SJA-949-64), which the Commission adopted on November 30, 1977, following remand from this Court.

References in the form "JA-" followed by a page number are to the Joint Appendix filed by RCA Globcom in connection with the Court's consideration of the Initial Order, and references preceded by the prefix "SJA" are to the Supplemental Joint Appendix which contains the additional pleadings before the FCC and the Commission's decision on remand.

3), the Court remanded this proceeding to the FCC for the limited purpose of permitting the Commission to advise the Court "whether the promulgation of the 'interim' [international] formula has, in the opinion of the FCC, a factual basis in the record independent of the FCC's tentative preference for an all-routed system [of distributing international telegraph traffic]." The only issue remaining before the Court is whether the FCC has complied satisfactorily with the Court's instructions on remand. ITT Worldcom submits that the FCC's Order on Remand, which expressly abandons any further consideration of prescribing an "all-routed" formula (SJA-950) and which fully justifies the "interim" formula on grounds independent of the "all-routed" concept, complies in full with the terms of the Court's remand. The Petition for Review should, therefore, be denied.

#### STATEMENT OF THE CASE

#### A. Background

The Court is familiar with the background of this controversy from its prior consideration of RCA Globcom's Petition for Review.

The basic policy question which was presented to the FCC in this proceeding is how outgoing international telegrams should be distributed among the various IRCs. The need for FCC regulation of this question arose in 1943, when Western Union

Telegraph Company ("Western Union") merged with the Postal Telegraph Company ("Postal"), its only domestic competitor, and acquired a virtual monopoly over telegraph service within the continental United States. (JA-3-4, SJA-1123) The Western Union-Postal merger posed a serious competitive danger to the corporate predecessors of RCA Globcom and ITT Worldcom because it left them dependent on Western Union, one of their competitors, to originate and deliver their international telegrams in most areas of the nation.\* (Id.)

When Congress enacted Section 222 of the Communications Act, and permitted Western Union to merge with Postal despite the prohibitions of the antitrust laws, it attempted to preserve the competitive vitality of the independent IRCs in two ways. First, it required Western Union to divest itself of its international telegraph operations. Section 222 (c)(2)

See, Western Union International Inc. v. F.C.C., 544 F.2d 87 (2nd Cir. 1976), cert. den., U.S. (1977) 87 (2nd Cir. 1976), cert. den., U.S. (1977) At the time of the Western Union-Postal merger, Western Union operated an international cables division, which was eventually divested, pursuant to Congressional mandate, to create an independent IRC, intervenor Western Union International, Inc. Although Western Union's international cables division was assured access to the facilities of its domestic affiliate for delivery and origination of its international telegrams, the predecessors of ITT Worldcom and RCA Globcom were not so Those carriers did not maintain extensive domestic communications networks, and they remain, to this day, primarily dependent on Western Union to originate and deliver international telegrams in the "hinterland" beyond the handful of gateway cities in which they are permitted by the FCC to operate.

of the Communications Act of 1934, as amended, 47 U.S.C. \$222(c)(2); See, Western Union International, Inc. v. F.C.C., 544 F.2d 87 (2nd Cir. 1976), cert. den., U.S. (1977).

Secondly, Congress provided for the development, under FCC supervision, of an "International Formula" for the division of outgoing international telegrams among the various carriers in a manner which was "just, reasonable, equitable and in the public interest." Section 222(e)(1); 47 U.S.C. \$222 (e)(1).

For the purpose of developing and applying the formula, Western Union's international cables division was to be treated as an independent IRC. Section 222(e)(4); 47 U.S.C. \$222(e)(4).

Before the Western Union-Postal merger was submitted to the FCC for the agency approval which Section 222 required, Western Union and the IRCs met in an attempt to devise a mutually-acceptable international formula. The carriers "initially took diametrically opposed positions with respect to the principles upon which a formula...should be based."

Application for Merger of The Western Union Telegraph Co. and Postal Telegraph Inc., 10 F.C.C. 184, 187 (1943). However, since Section 222(e) contemplated that the FCC would prescribe the international formula only if the interested carriers were unable to agree among themselves, the FCC directed the carriers to resume their discussions, and eventually they reached

"substantial agreement" on a proposed formula.\* <u>Id.</u> at 189.

After modifying the carriers' proposals in certain respects,
the FCC prescribed an international formula which continued in
effect, with minor changes, until the FCC's Initial Order
herein.

The formula prescribed by the FCC in 1943 divided international telegraph traffic into a complex system of

<sup>\*</sup> RCA Globcom's post-remand brief seems to suggest that the carriers' negotiations prior to the prescription of the international formula created some sort of contract right in the 1943 formula. This is not the case. Section 222(e)(3) of the Communications Act explicitly authorizes the FCC to make changes in the formula, "upon a complaint or upon its own initiative", whenever considerations of equity or public interest require it to do so. Future revisions of the formula were contemplated by both the FCC and the carriers when the original formula was adopted. Application for Merger, supra, 10 F.C.C. at 195-96.

The clause of Section 222(e)(3) which provides that the international formula shall be, "so far as consistent with the public interest, in accordance with the existing contractual rights of the carriers," was not intended to create a contract interest in the original international formula. Instead, as the legislative history of Section 222 indicates (see 89 Cong. Rec. 1092, 1145, [Feb. 18, 19, 1943]), this clause was inserted merely to assure that contracts existing at the time of the merger, such as those providing for the interchange of international traffic between domestic and international carriers (e.g., the ITT-Postal agreement described in Application for Merger, 10 F.C.C. at 180) would be continued under the new formula if the public interest would be served thereby. Congress did not intend to provide that the first international formula prescribed by the FCC would become a contract in perpetuity for the purposes of Section 222(e)(3), as the Court recognized in its decision on rehearing. 563 F.2d at 2 (SJA-947)

categories and subcategories, and, in general, established quotas in each category for each carrier.\* (JA-4-6, SJA-1123-24) The formula was premised on two basic principles. First, customers' choices between the competing IRCs were to be honored. (JA-5, SJA-1124) If a customer wished to "route" his international telegram via the facilities of a particular international carrier (either by filing the telegram directly with that carrier or by delivering it to Western Union with instructions identifying the international carrier which the customer wanted to carry the message), the customer's wishes would be respected, and the international carrier he selected would receive the message for transmission.

Secondly, the formula attempted to assure the international carriers of the market shares which they enjoyed before the Western Union-Postal merger.\*\* (JA-4-5, SJA-1123-24) To accomplish this result, "unrouted" traffic was treated

<sup>\*</sup> Special rules and quotas were prescribed for certain geographical areas and for certain types of traffic. See Initial Order, JA-18-25, SJA-1133-39. One of these special rules, the so-called "Schedule B" of the formula, proved to be highly advantageous to RCA Globcom. (JA-18-21, SJA-1133-35)

<sup>\*\*</sup> Because of wartime dislocations, the pre-merger division of the market which the formula sought to preserve was established as the market shares the carriers received in 1942, or in the last prior 12-month period in which communications were maintained to the relevant geographic area. (JA-5, SJA-1124, n.7)

as a balancing factor, and each carrier was allocated a sufficient amount of unrouted traffic so that its total amount of traffic, both routed and unrouted, would equal its pre-merger share of the formula category in question. (JA-5-6, SJA-1124)

As the FCC observed, both when the formula was prescribed,\*
and subsequently,\*\* this balancing provision of the original formula was thought to be necessary to provide the independent IRCs further protection against the possibility that Western Union would favor its own Cables Division pending divestiture.\*\*\*

By holding the carriers' total market shares static, the formula reduced Western Union's incentive to employ unfair competitive tactics, since any increase in its routed traffic was to be offset by a corresponding reduction in its allocation of unrouted traffic. (JA-5-6, SJA-1124)

<sup>\*</sup> Application for Merger, supra, 10 F.C.C. at 194.

<sup>\*\*</sup> Initial Order, JA-5-6, SJA-1124; Reconsideration Order, JA-73.

Union had an obvious incentive to simply insert the routing "via Western Union cables" whenever a customer filed an international telegram with one of Western Union's offices, even though the customer had expressed no preference among the international carriers. (JA-5, SJA-1124) Such abuses of Western Union's monopoly did in fact occur prior to the divestiture of Western Union's international operations in 1963. The Western Union Telegraph Co., 25 F.C.C. 35, 65-66, 87 (1958), rev'd. in part on other grds., sub nom. Western Union Telegraph Co. V. United States, 267 F.2d 715 (2nd Cir. 1959).

#### B. The FCC's Initial Order

In its Initial Order, the FCC decided to revise the international formula, which by then had been in effect over 30 years.

The Commission found that the original international formula no longer operated as had been intended. (JA-3, SJA-1122) As a result of expansion of the IRCs' operations in their so-called "gateway" cities and other changes in the marketplace, the percentage of total international telegraph traffic which was "routed" had steadily increased, until the pool of unrouted traffic became too small to maintain the carriers' pre-merger market shares.\* (JA-15, SJA-1131-32)

For most of the categories of traffic recognized by the old formula, the Commission found that the carriers which were successful in attracting customer routings were exceeding their formula quotas through their routed traffic alone, and even though the less-successful carriers received all of the unrouted traffic for the geographic area in question, there were not enough unrouted telegrams to fill their quotas.\*\*

<sup>\*</sup> In the FCC's test year of 1974, approximately two-thirds of the 8.6 million international telegrams originating in the United States were "routed" by the senders, and only one-third were unrouted. (JA-11, SJA-1129)

<sup>\*\*</sup> Proportioned distribution of unrouted traffic was still in effect only with respect to approximately 15 percent of the total international telegraph market. (JA-14, SJA-1131)

(JA-11-16, SJA-1128-32) As a result, the less-successful carriers incurred large "deficiencies" in their allocations of unrouted traffic. These deficiencies accumulated year after year, and under the rules by which the old formula was administered, the more successful carriers would never receive any unrouted telegrams until the less successful carriers had first received enough unrouted traffic to completely eliminate their accumulated deficiencies. (JA-15, SJA-1132)

As the Commission recognized, the cumulative effect of the old formula had been to create "serious distortions in [the] distribution patterns" of the international telegraph industry. (JA-15, SJA-1132) Certain carriers, principally ITT Worldcom and intervenor TRT Telecommunications Corp. ("TRT"), had, on the whole, been considerably more successful than their competitors in exceeding their quotas with routed traffic. (JA-13-14, SJA-1130-31) Other carriers, including RCA Globcom and intervenor Western Union International, Inc. ("WUI"), had accumulated large net "deficiencies," and therefore received the great bulk of available unrouted traffic. (Id.) Thus, ITT Worldcom and TRT received only 11% and 1.4%, respectively, of the total unrouted traffic, while RCA Globcom and WUI received 48% and 38%. (JA-13, SJA-1130) As the FCC found, this distribution of the unrouted traffic bore no rational relationship to customers' preferences among the IRCs, as measured by the carriers' success in attracting customer routings. For example, ITT Worldcom and RCA Globcom attracted roughly equal percentages of routed traffic during 1974 (33.68% and 33.12%, respectively), yet the formula gave RCA Globcom over four times as much unrouted traffic as it allocated to ITT Worldcom (48% vs. 11%).\* (JA-13, SJA-1130)

On the basis of findings such as these, the Commission concluded not only that the old international formula failed to work as had been intended, but also that the formula's original goal of maintaining the carriers' pre-merger market shares was no longer equitable or in the public interest. (JA-2-3, SJA-1122) The Commission observed that "whatever may have been the justification for [the original formula] under the unique circumstances facing us in 1943, the present conditions in the industry and the economy generally indicate that such practices now work against the public interest." (<u>Id</u>.) The basic rationale for the balancing provision of the old formula - the danger that Western Union would unfairly favor its own Cables Divisions - had been eliminated in 1963, when Western Union divested itself of its

<sup>\*</sup> TRT obtained 5.5%, and WUI obtained 26.65% of the routed traffic. (JA-13, SJA-1130) The carriers' shares of total traffic (routed and unrouted combined) were as follows: RCA Globcom, 38.38%; WUI, 30.59%; ITT Worldcom, 25.93%; TRT, 4.10%. (Id.)

international operations, creating an independent WUI.\* (JA-73) The distorted pattern of distribution effectuated by the old formula thus served no further public purpose, but instead stood only as a "disincentive" to competition among the IRCs, which discouraged improvements that the carriers might have made in their service to the public if those competitors which were successful in attracting additional routed traffic had not been penalized with a corresponding reduction of their share of unrouted traffic. (JA-17, SJA-1133) There was, the Commission found, "no stimulus under the present formula to improve service or increase efficiency." (JA-26, SJA-1139)

Having determined that the old formula was neither equitable nor in the public interest, the Commission concluded that the public and the carriers would best be served by an international formula which distributed unrouted traffic among the IRCs on the basis of customer choice. (JA-27, SJA-1140) The FCC prescribed a new international formula which allocated unrouted traffic to the IRCs in the same proportion

See Application for Merger of the Western Union Telegraph
Co. and Postal Telegraph, Inc., 35 F.C.C. 233 (1963).
One year following Western Union's divestiture, ITT
Worldcom filed its complaint with the FCC requesting
revision of the international formula. (JA-113)

as they obtained routed traffic from customers who cared enough, and were informed enough, to choose a particular carrier to transmit their messages overseas. (JA-28, SJA-1141) In contrast to the old formula, the new formula thus rewarded, rather than penalized, successful competitors and thereby provided the carriers with an incentive to improve their service to the public which had been missing from the original formula.\*

Although the new formula was found by the FCC to be just, reasonable, equitable, and in the public interest (as the Commission ultimately made clear in its Order on Remand), the Initial Order denominated it as an "interim" formula, because the FCC then expected to adopt a so-called "all-routed" formula, which would have required every customer filing an international telegram with Western Union to choose one of the competing IRCs to handle his message. (JA-27, SJA-1140) However, the FCC's Initial Order recognized that the FCC did not yet have sufficient knowledge of the costs and practicalities of the all-routed formula, or of the possible effects of the all-routed system on the telegram-sending public, to

<sup>\*</sup> The new formula created a continuing incentive encouraging competitive efforts to win additional customer routings, because it provided that the carriers' allocations of unrouted traffic would be recalculated periodically to reflect changes in the carriers' share of routed traffic. (JA-29, SJA-1141)

permit it to implement such a system of distributing international telegraph traffic among the carriers. (Id.) The FCC therefore prescribed the "interim" formula as the new international formula, and initiated a further administrative inquiry to investigate the possibility of adopting an "all-routed" formula. (JA-35, SJA-1146)

#### C. Prior Proceedings in this Court

On February 13, 1976, RCA Globcom filed its Petition for Review of the FCC's Initial Order. After the FCC denied RCA Globcom's petition for a stay pending appeal, in its Reconsideration Order,\* RCA Globcom sought a stay from the Court, but its motion was denied on October 19, 1976 by a panel consisting of Judges Oakes, Timbers and Van Graafeiland. Argument on the merits of RCA Globcom's Petition was heard by Judges Moore, Feinberg and Gurfein, and on July 27, 1977, the Court announced its decision, in an opinion by Judge Moore, with Judge Feinberg concurring separately. RCA Global Communications, Inc. v. F.C.C., 559 F.2d 881 (2nd Cir. 1977) (SJA-935-945).

The Court first rejected the principal argument raised by RCA Globcom in support of its Petition, that the FCC was required to hold a full-fledged, trial-type hearing before

<sup>\*</sup> The Reconsideration Order (JA-70-84) also reaffirmed the Initial Order in all respects here relevant.

it could modify the international formula. The Court pointed out that "the emphasis today, in the absence of a specific statutory directive as to the requisite form of hearing, is on the requirements of the particular case," 559 F.2d at 886 (SJA-940), and held that in the circumstances of the case at hand, the extensive series of written pleadings the FCC had received from the carriers, and the lengthy statistical study the FCC had undertaken of the distribution of international traffic resulting from the old formula, were adequate to satisfy the hearing requirement of Section 222(e)(3).\* 559 F.2d at 887 (SJA-941).

When the Court turned to an examination of the merits of the FCC's decision, it found itself "stymied in attempting to review the adequacy" of the Commission's findings in support of the interim formula. 559 F.2d at 890 (SJA-944). The Court recognized that "a reviewing court's responsibility is not to supplant the Commission's balance of...interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors." Id. However, the Court held that the Commission had failed to articulate an adequate basis for its

<sup>\*</sup> The administrative procedures which culminated in the Initial Order are fully described in ITT Worldcom's principal brief.

conclusion that the new interim formula was in the public interest. 559 F.2d at 891 (SJA-942).

The Court noted that, by definition, an "interim" formula "looks to something more permanent" which the Commission had indicated would be an "all-routed" system of distribution. 559 F.2d at 887 (SJA-941). As the Court recognized, the FCC had conceded that it did not yet have adequate factual knowledge to permit it to prescribe an all-routed formula, and that its own studies had indicated that a large number of customers did not care to "route" their international telegrams via a particular IRC because they lacked the necessary familiarity with the carriers to make a knowledgeable choice among them. 559 F.2d at 887, 888 (SJA-941, 942). Although the Court was careful not to usurp the function of the Commission, it expressed considerable doubt as to whether the all-routed formula would ultimately be found to be in the public interest. The Court graphically described the plight of a typical customer who, upon entering a Western Union telegraph office, was told that he might no longer simply leave his international telegram for transmission, but must instead "absorb a history of the transoceanic telegraph industry and make a choice among the IRCs despite his indifference as to

which of the carriers transmitted his message. 559 F.2d at 888-9 (SJA-942-3).\*

The Court observed that although the new formula was denominated an "interim" measure, the carriers had been "directed now to devote their efforts to forcing the public into an all-routed system," and held that before such efforts were undertaken, the Commission should be required to justify the ultimate objective it was directing the carriers to pursue. 559 F.2d at 890-891 (SJA-944-45). The Court therefore vacated the Commission's decisions, so that the Commission could explore the concededly unresolved questions as to whether the all-routed formula, and interim steps toward that formula, would serve the public interest.

Timely petitions for rehearing of the Court's decision were filed by ITT Worldcom, TRT and the FCC. ITT Worldcom urged that the FCC's orders, while of less than crystal clarity, indicated that the interim formula had adequate justification in the record which was independent of the FCC's announced inclination to move toward an all-routed formula. ITT Worldcom suggested that if the Court could not discern an adequate independent basis for the interim formula

<sup>\*</sup> The Court also questioned whether the substantial expense of administering the all-routed system would be worthwhile. 559 F.2d at 889 (SJA-943).

from the Commission's Initial Order, the Court should not simply vacate the Commission's decision, but should instead remand the case to the FCC for the limited purpose of permitting the Commission to advise the Court whether the promulgation of the interim formula had, in the FCC's opinion, "a factual basis in the record independent of the FCC's tentative preference for an all-routed system."

On October 5, 1977, the Court granted ITT Worldcom's request that the terms of the remand be limited.\* RCA Global Communications, Inc. v. F.C.C., 563 F.2d 1 (2nd Cir. 1977) (SJA-946). In its decision on rehearing, the Court emphasized that its earlier opinion had been "concerned primarily" with the public interest implications of the all-routed formula.

563 F.2d at 2 (SJA-947). The Court recognized, however, that Section 222 also required the Commission to prescribe a formula which was "equitable" to each of the carriers, and suggested that if plans for the all-routed system were abandoned by the FCC on remand, equity might be the controlling factor in the FCC's decision:

"Were 'all-routed' plans to be eliminated or at least postponed for definitive findings, the division of 'unrouted' messages would appear to be the primary issue. With ten months' experience behind them, the parties should be able to submit to the FCC such

<sup>\*</sup> The Court also denied RCA Globcom's motion for immediate issuance of the mandate.

proof as would bear upon the equities or inequities of the 'interim' plan." 563 F.2d at 3 (SJA-948).

Although ITT Worldcom's rehearing petition had suggested that the FCC's decision on remand could be made on the existing administrative record, the Court directed that the remand "is not to be limited to the record already made" if the parties wished to submit additional "tten arguments or affidavits. 563 F.2d at 3 (SJA-948). However, "because of the importance of the time element," the Court suggested that any additional proof be submitted to the agency within 30 days, and that the Commission endeavor to reach its decision within 60 days after the Court's order on rehearing. (Id.) The Court retained jurisdiction of the case.

#### D. The FCC's Order on Remand

On remand, the FCC adhered to the Court's instructions and invited the interested parties to file any additional written presentations which they wished the Commission to consider. (SJA-972) Additional pleadings were submitted by Western Union, RCA Globcom, ITT Worldcom, WUI and TRT. The FCC also obtained a statistical study, prepared by the International Quota Bureau, which showed how international telegraph traffic had actually been distributed by the interim formula during the period from January 1, 1977 to June 30, 1977.

(SJA-1119) On the basis of the supplemented record before it, and its familiarity with the background of the international formula and the telegraph industry, the FCC entered its Order on Remand which (1) terminated the administrative proceeding that had been initiated to consider the adoption of an "all-routed" formula and (2) prescribed the "interim" formula as the international formula on a permanent basis. (SJA-950)

The FCC's decision to abandon further consideration of the all-routed formula confirmed the validity of the doubts which the Court had expressed as to the wisdom of that formula. The FCC noted that Western Union had recently installed an automatic system which permitted it to distribute unrouted traffic in accordance with the interim formula at the relatively minor expense of approximately \$50,000 annually. (SJA-951) The Commission observed that Western Union had estimated the additional cost of administering an "all-routed" formula to be millions of dollars annually, and found that any public benefits to be obtained from an all-routed formula did not justify such a large additional expenditure. (Id.) Moreover, the Commission recognized that many customers were satisfied to place their messages with Western Union without any routing, and the Commission saw no reason to "disrupt the convenient service through Western Union to which the public has become accustomed. (SJA-951)

Turning to the interim formula, the FCC found that the "interim" formula should become the "permanent" international formula and that the Commission had (both then and at the time of the Initial Order) sufficient grounds for prescribing the interim formula which were independent of its now-abandoned interest in an all-routed formula. As the FCC explained:

"When we prescribed the interim formula we were confident that it would be a vast improvement over the 1943 formula (although we had hopes that the all routed method would prove to be even better)." (SJA-951)

The Commission emphasized that its "goal is to encourage the carriers to continually strive to offer the public the best service possible at the lowest possible rates." (SJA-959) The new formula, the FCC found, "is a powerful incentive towards achieving this goal." (SJA-959) By contrast, the old 1943 formula "did not reward improvements in service or prices at all, but stood as a disincentive to such improvements." (SJA-959-60)

The FCC thus reaffirmed the Initial Order's conclusion that the public interest in encouraging service improvements would be furthered by rewarding successful competitors with additional unrouted traffic, rather than penalizing them by freezing their market shares despite their competitive success. As the Commission explained, the new formula achieves these public benefits by using the choices of those customers (principally large users of international communications services) who are knowledgeable and concerned enough to designate a particular IRC to handle their international telegrams, as the basis for distributing the messages of other customers who are less familiar with the international telegraph industry:

"The customers who do route their traffic, for the most part business customers, are keenly interested in the best service for the lowest cost and do educate themselves about the IRCs. By correlating the distribution of unrouted messages with routed messages, we insure that improvements in service or prices which earn the business of knowledgable users will also be rewarded by unrouted messages. Thus, the incentive to provide the very best is maximized, and the public interest will benefit accordingly." (SJA-960, footnote omitted).

The service improvements resulting from the competitive incentives of the new formula will benefit both the knowledgeable customer who routes his telegrams and the occasional, unsophisticated user, because the carriers use the same physical facilities to transmit both routed and unrouted traffic. (SJA-960) In other words, the new formula achieves many or all of the competitive benefits of an all-routed formula, without the dislocations and excessive expense that the all-routed system might have created.

The Order on Remand noted further that "all the IRCs, whether opposing or favoring retention of the interim formula, acknowledge that it maintains or increases the incentive to secure as many direct routings as possible." (SJA-964). The FCC reiterated that its administrative experience had shown that "carriers competing in this fashion must out of self interest strive to improve service efficiency and to keep charges as low as possible." (Id.) The Commission found that this assessment of the impact of competition, which was originally based primarily on the agency's expert knowledge and familiarity with the communications industry, was corroborated by experience during the short period of time that the new formula had been in effect. ITT Worldcom's post-remand comments identified seven technical improvements in the quality of its international telegraph service which, the Commission found, may have been hastened by the competitive incentives resulting from the new formula. (SJA-955, 964) The Commission stated that improvements such as these "are of the type we anticipated the [new] formula would inspire, " and indicated that it expected similar improvements to be offered by other carriers once the uncertainty concerning the future status of the new formula was resolved. (Id.)

In addition to finding that the new formula was in the public interest, the FCC found that it met the further

equitable and reasonable. (SJA-964) The new formula treated the carriers equitably by assuring each carrier an equal opportunity to share in the pool of unrouted traffic by obtaining additional routed traffic. (SJA-963) Successful competitors like ITT Worldcom and TRT were no longer denied a fair share of the unrouted traffic on the basis of the outdated balancing provision of the old formula. Unfair distortions of distribution, which had resulted over the years from the old formula, were eliminated. (SJA-963) Under the new formula, the distribution of international traffic would remain responsive to future changes in industry conditions and customer choice, because each carrier's allocation of unrouted traffic would be recalculated periodically to reflect variations in the carrier's share of routed traffic. (Id.)

As the Court suggested it do, 563 F.2d at 2-3 (SJA-947-8), the FCC also considered how well the new formula had worked during the period it had already been in effect. The FCC found that the new formula had operated smoothly. Administration of the formula had been simplified, because the new formula did not continue the old formula's complex system of categorizing international telegraph traffic, but instead

distinguished only between routed and unrouted traffic.\*

(SJA-963) The FCC found that as a result of this simplification, "many of the sources of controversy found in the original formula" had been eliminated. (SJA-962) The Order on Remand noted that no complaints about the way the new formula had been administered were brought forth in the carriers' post-remand pleadings, and the Commission predicted that any future disputes "may be equitably disposed of since the formula leaves little room for dispute once the facts, based on statistical reports [of the carriers' shares of routed traffic] are ascertained and the straight forward allocation system we have prescribed is applied to those facts." (SJA-964)

Before finally deciding to prescribe the interim formula on a permanent basis, the Commission thoroughly considered the arguments against that formula which were advanced by RCA Globcom and WUI.

First, the FCC addressed RCA Globcom's renewed argument that the new formula would lead it to increase its advertising expenditures substantially.\*\* RCA Globcom

<sup>\*</sup> The FCC's Initial Order had relied upon this anticipated simplification of the manner in which unrouted traffic was distributed as a significant reason for prescribing the interim formula. (JA-28, SJA-1141)

<sup>\*\*</sup> WUI, which also opposed the new formula, did not join in this argument. To the contrary, WUI advised the FCC that in its estimation, competition among the IRCs had not been increased by the new formula. (SJA-1019)

stated that it had estimated the cost of a "nationwide marketing and advertising campaign" (which RCA Globcom had presumably calculated on the assumption that the now-abandoned all-routed formula would be adopted) would total approximately \$2 million, and that RCA Globcom had already "budgeted" \$670,000 annually for solicitation of international telegraph traffic.\* (SJA-958) The FCC expressed considerable doubt that RCA Globcom's advertising expenditures would actually increase dramatically; it found "no indications in RCA Globcom's pleadings that it is considering expanding its solicitation expenditures to the scale it claims is necessary for nationwide coverage. \*\*\* (SJA-958) In any event, RCA Clobcom had not advanced "specific facts to show that the public interest would be disserved by increased marketing efforts. " (SJA-958) Rather, the FCC found that RCA Globcom's arguments merely demonstrated its recognition of the competitive stimulus provided by the new formula, and the need for it to increase its competitive efforts to maintain the favored status which the old formula

學

<sup>\*</sup> RCA Globcom's was currently spending approximately \$340,000 annually to solicit international telegraph traffic. (SJA-982)

<sup>\*\*</sup> Obviously, RCA Globcom would not rationally increase its advertising expenditures without some consideration of the additional profits it might be able to obtain as a result. In this connection, it should be noted that in the test year of 1974, the total gross revenues of all of the carriers from outgoing international telegrams was only \$21.5 million (JA-11, SJA-1129), and the industry's profits on this business are, of course, only a fraction of that amount.

had given it. This increased awareness of the importance of competitive marketing, the FCC believed, would soon give rise to efforts on RCA Globcom's part to "improve, where possible, the facilities underlying service to the public." (SJA-958).

The second argument against the new formula, raised by both RCA Globcom and WUI, was that the new formula had shifted approximately 50,000 of the 7.9 million international telegraph messages sent annually from carriers with "direct" circuits to the telegram's destination to carriers which served the destination "indirectly" through interconnections with foreign carriers. The FCC concluded that such a de minimis shift of traffic to indirect service is "not in our opinion a threat to the public interest." (SJA-959) As the Initial Order had previously found, the Commission could avoid shifting this small volume of traffic to indirect circuits only by denying "substantial portions of unrouted traffic to small carriers [e.g., TRT] who serve a higher percentage of their service points through intermediate connections." (SJA-959). The Commission found that such a restriction on the smaller carriers' ability to compete would be inconsistent with the aims of the new formula. (JA-29, SJA-1142) The FCC observed that the "problem" which RCA Globcom and WUI perceived would tend to correct itself, since if the carriers now providing indirect service were successful in attracting additional

traffic under the new formula, they would in all likelihood apply to the FCC for authority to serve the points in question directly.\* (SJA-959)

Finally, the FCC examined RCA Globcom's allegation that the new formula would encourage the carriers to concentrate their marketing efforts primarily on large business users which already "routed" their international telegrams. The Commission assumed this to be the case, but saw nothing "in this marketing approached that persuades us to set aside the interim formula." (SJA-959) As mentioned previously, the Commission found that competition for routings would benefit both those customers who routed and those who did not, since it would encourage the IRCs to improve facilities which were used for routed and unrouted traffic alike. (SJA-960)

In completing its analysis of RCA Globcom's arguments, the FCC repeated an observation from its Initial Order that "RCA [Globcom] appears to be asserting that its quota [under the old formula] gives it a claim to a guaranteed amount of traffic." (SJA-960) The Initial Order expressly rejected

<sup>\*</sup> Conversely, the new formula provides a built-in mechanism to award traffic to the "direct circuit" carriers if indirect service proves to be inadequate, since the "indirect" carriers will obtain no allocation of traffic at all to the destination in question unless they can first convince the knowledgeable customers who "route" their telegrams that their indirect service is worthy of patronage.

this contention (JA-31, SJA-1143), as did the Court in its decision on rehearing. 563 F.2d at 2 (SJA-947). The FCC concluded:

"In this instant proceeding [on remand], RCA has brought forward nothing to cause us to modify that finding. Moreover, we can find no indication by RCA that the quality of service it provides to the public would suffer in any way by retention of the interim formula." (SJA-961)

The Commission therefore prescribed the "interim" formula as the permanent international formula.

#### ARGUMENT

Point I: The FCC Properly Found That The New Formula Was In The Public Interest

In its prior opinions in this case, the Court was careful not to arrogate to itself the Commission's statutory responsibility to determine how best to protect the public's interest in maintaining efficient and economical international communication services. As the Court properly recognized, its role is "not to supplant the Commission's balance of interests with one more nearly to its liking" but rather only "to assure itself that the Commission has given reasoned consideration to each of the pertinent factors."\* 559 F.2d at 890 (SJA-944). In

[Footnote continued on next page]

<sup>\*</sup> The Court's statement of this axiom of administrative law, taken from the Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968), finds ample support in other opinions of the Court reviewing FCC decisions. See, e.g.,

its Post Remand Brief, RCA Globcom invites the Court to ignore this well-established distinction between the duties of administrative agency and reviewing court, by substituting the Court's policy judgments and assessments of the record for those of the agency charged by Congress with the responsibility of regulating the communications industry. The Court should reject RCA Globcom's arguments, and affirm the FCC's Order on Remand.

A. The FCC's Decision that the Competitive Incentives of the New Formula Will Promote the Public Interest is a Policy Decision Which the FCC Properly Made on the Basis of its Expert Knowledge of the Communications Industry.

As the Supreme Court has made clear, when an administrative agency, acting on its expert knowledge of the

[Footnote continued from previous page]

National Association of Independent Television Producers and Distributors v. F.C.C., 516 F.2d 526, 542 (2nd Cir. 1975); National Association of Motor Bus Owners v. F.C.C., 460 F.2d 561, 565-66 (2nd Cir. 1972); Mt. Mansfield Television, Inc. v. F.C.C., 442 F.2d 470, 481-82 (2nd Cir. 1971); Cornell University v. United States, 427 F.2d 680, 683 (2nd Cir. 1970); Radio Relay Corp. v. F.C.C., 409 F.2d 322, 326 (2nd Cir. 1969).

The deference owed the administrative agency is not diminished by the fact that the Court found it necessary to remand the Initial Order to the FCC for further consideration. F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134 (1940); Nat'l. Ass'n. of Motor Bus Owners v. F.C.C., supra.

industry it regulates, decides that encouraging competition will promote the statutory goals of the agency's regulatory legislation, the courts should not interfere with the agency's decision:

"A policy in favor of competition embodied in the laws has application in a variety of economic affairs. Even where Congress has chosen Government regulation as the primary device for protecting the public interest, a policy of facilitating competitive market structure and performance is entitled to consideration. The Commission, of course, is entitled to conclude that preservation of a competitive structure in a given case is overridden by other interests, but where, as here, the Commission concludes that competition 'aids in the attainment of the objectives of the [legislative policy the agency administers],' we have no basis for disturbing the Commission's accommodation. Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 298-99 (1974) (citations omitted).\*

RCA Globcom's principal argument against the FCC's Order on Remand is that the FCC did not, in RCA Globcom's opinion, have a sufficient evidentiary basis for its conclusion that rewarding competitive performance through the new formula will benefit the public. However, RCA Globcom fails to recognize that the question of whether competition

Bowman Transportation is but one of a series of Supreme Court decisions which permit (and, indeed, encourage) administrative agencies to employ competitive principals to promote the public interest. See also, Gulf States Utilities Co. v. F.P.C., 411 U.S. 747, 759 (1973); F.M.C. v. Svenska Amerika Linien, 390 U.S. 238 (1968), Denver & R.G.W.R. Co.v. United States, 387 U.S. 485, 498 (1967); United States v. Radio Corporation of America, 358 U.S. 334 (1959); McLean Trucking Co. v. United.States, 321 U.S 67, 79-80 (1944); National Broadcasting Co. v. United States, 319 U.S. 190, 218 (1943).

should be encouraged in a regulated industry is essentially a policy decision, which must be made by the agency on the basis of its expert familiarity with the industry, rather than on formal adjudicatory proof. This point was emphasized by the Supreme Court in the case on which RCA Globcom principally relies, F.C.C. v. RCA Communications, Inc., 346 U.S. 86, 96-97 (1953) (citation omitted):

"To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles 'by specialization, by insight gained through experience, and by more flexible procedure.' In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast..."

It would be "asking too much" to require the agency "to demonstrate tangible benefits," and the Court in RCA Communications held that the Commission need only "warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it... [I]t is not too much to ask that there be ground for reasonable expectation that competition may have some beneficial effect."

346 U.S. at 97 (emphasis added).\*

[Footnote continued on next page]

<sup>\*</sup> The Court held in RCA Communications that the agency's decision to further competition must be based on its assessment of the needs of the industry it regulates, and not on some more general notion of national economic

Subsequent decisions of the lower courts have consistently found that the standard for agency decision-making which was articulated in <a href="RCA Communications">RCA Communications</a> is satisfied when the Commission (1) states that its expert knowledge of the communications industry leads it to believe that competition will benefit the public and (2) explains in a general way how and why it expects such a benefit will come about.\* The FCC's Order on Remand fully meets this standard.\*\* The FCC has

[Footnote continued from previous page]

policy. 346 U.S. at 95. However, as this Court recognized in Eastern Air Lines, Inc. v. C.A.B., 271 F.2d 752, 759 (2nd Cir. 1959), cert. den., 362 U.S. 970 (1960), RCA Communications is equally clear that when the agency's decision to rely upon competitive incentives is based upon its own expert knowledge of the industry under its control, the courts should not interfere with its decision. See 346 U.S. at 96.

See, e.g., American Telephone & Telegraph Co. v. F.C.C., (2nd Cir. 1978) (Docket No. 77-4057, decided January 26, 1978) Slip opinion at pp. 10-11; American Telephone & Telegraph Co. v. F.C.C., 539 F.2d 767, 772 (D.C. Cir. 1976); Washington Utilities & Transportation Commission v. F.C.C., 513 F.2d 1142, 1159 (9th Cir. 1975), cert. den., 423 U.S. 836 (1975); Bell Telephone Co. of Pa. v. F.C.C., 503 F.2d 1250, 1271-73 (3rd Cir. 1974), cert. den., 422 U.S. 1026 (1975); General Telephone Co. of Southwest v. United States, 449 F.2d 846, 858 (5th Cir. 1971).

Although the Commission has made the findings required by RCA Communications and its progeny, it should be noted that one three judge court, reviewing a decision of the Interstate Commerce Commission, has recently suggested that Bowman Transportation, quoted supra, has overruled RCA Communications to the extent it required the agency to describe the public benefits it expected to accrue from competition. Trans-America Van Service, Inc. v. United States, 421 F. Supp. 308, 323 n. 17 (N.D. Tex. 1976).

warranted that rewarding successful competition for routings through the new formula will benefit the public and has fully explained, on the basis of its knowledge of the telegraph industry, how it expects this benefit to come about as the carriers improve their services to win additional routings. The case law requires nothing more.\*

If the Court were to overrule the precedents applying RCA Communications, and accept RCA Globcom's suggestion that the benefits of competition must be fully documented by indisputable evidence, the Court would, as RCA Communications points out, "disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles by specialization, by insight gained through experience," and by more flexible procedure." 346 U.S. at 96. The standard

Hawaiian Telephone Co. v. F.C.C., 498 F.2d 771 (D.C. Cir. 1974), the only case in addition to RCA Communications cited in this regard by RCA Globcom, is not to the contrary. In that case, it was "all too embarrassingly apparent that the Commission [had] been thinking about competition, not in terms primarily as to its benefit to the public, but specifically with the objective of equalizing competition among competitors." 498 F. 2d at 776. Not surprisingly, the FCC therefore failed to articulate any public benefit which would result from its decision, and thus did not meet the standard of RCA Communications. The discussion of the administrative findings which would have been required if the FCC had properly directed its attention to the effect of competition on the public rather than the carriers, see 498 F.2d at 777, is consistent with the other cases following RCA Communications which are cited, supra.

of judicial region which RCA Globcom advocates would virtually preclude an agency from relying upon its administrative expertise to adopt new policies for prospective applicability since, as the Supreme Court has recognized, a "forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency." F.P.C. v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 29 (1961) (emphasis added). The courts have therefore rejected the argument that the Commission must refrain from implementing actions it has found to be in the public interest until it verifies its expert assessment of the needs of the industry through exhaustive, time consuming investigations:

"Contrary to petitioners' assertions, no general principle of administrative law forces all agencies to conduct exhaustive economic impact studies before taking action. Such a requirement would hamstring administration at every juncture of the policy making and implementation process."

North Carolina Utilities Comm'n. v. F.C.C., 552

F.2d 1036, 1054 (4th Cir. 1977), cert. den.,

U.S. (1977).\*

And as this Court has stated:

"The Commission does not have to wait for evidence that can only be supplied by the future." National

<sup>\*</sup> See also, General Telephone Co. v. F.C.C., supra, 449 F. 2d at 857, in which the FCC was permitted to respond to what it presently perceived to be the industry's problems, even though "the Commission does not know or even pretend to know, what the future of [the industry] will be."

Association of Independent Television Producers & Distributors v. F.C.C., 516 F.2d 526, 541 (2nd Cir. 1975).\*

Obviously, the question of whether all of the public benefits which the FCC expects will actually result from the new formula cannot be answered conclusively until the interim formula has been in permanent effect for a period of time, free of the uncertainties created by this review proceeding, so that the steps which the IRCs actually take in response to the new regime can be assessed. Thus, RCA Globcom's suggestion that the FCC should be required to "prove" that every benefit it anticipates from the new formula will actually be achieved before it can make any change in the international formula would make it impossible, as a practical matter, for the agency to make any changes whatsoever in the international formula - a result contrary to the statutory policy of Section 222, to the holding of RCA Communications, supra, and to this Court's decision in National Association of Ind. Tel. Prod. & Dist., supra.

Although the FCC cannot now document every improvement in service which will result in the future from the competitive incentives of the new formula, the FCC's Order on Remand found that in the short period during which the new

<sup>\*</sup> Accord, WBEN, Inc. v. United States, 396 F.2d 601, 613 (2nd Cir. 1968), cert. den., 393 U.S. 914 (1968).

formula had actually been in effect, ITT Worldcom had already made a number of improvements in the quality of its international telegraph service and that these improvements may have been undertaken or expedited, at least in part, as a result of the competitive stimulus of the new formula.\* While the FCC is of course not required to adduce examples such as these of the tangible benefits of competition, (see <a href="RCA Communications">RCA Communications</a> and the cases cited, <a href="supra">supra</a>), its findings that service improvements have already occurred "provide concrete confirmation" of the FCC's expectation, which was originally based on its expert knowledge of the industry, that the competitive incentives of the new formula would serve the public. (SJA-964)

Moreover, the FCC's expectation that rewarding successful competition would benefit the public is fully consistent with the history and structure of the international telecommunications industry. Unlike the typical regulated industry, the international telecommunications industry has traditionally been characterized by vigorous competition among the IRCs.\*\* Aside from the old international formula, there

<sup>\*</sup> RCA Globcom questions whether these service improvements were attributable to the new formula, but as is discussed, infra, p. 45, n. \*, the inferences to be drawn from the fact that ITT Worldcom made these changes are to be made by the FCC, not the Court.

<sup>\*\*</sup> The competitive nature of the industry was recognized by the carriers in their pleadings with the FCC. See, e.g., JA-232, JA-257, JA-577.

have been no quotas or allocations which divide customers or revenue among the carriers. With respect to their communication offerings other than international telegraph service, such as telex and various private line services, the IRCs have always competed with each other to obtain as many customers as they could, and they have kept the rewards of any competitive success they enjoyed. (JA-26, SJA-1139) Prior to Western Union's merger with Postal and the adoption of the old formula, vigorous, open competition also existed among the carriers to provide international telegraph service, a competition which, the Initial Order found, "benefitted the public in the form of increased service coverage and substantially reduced rates". (JA-26, SJA-1139) Even after the old international formula was adopted, there continued to be limited competition among the IRCs for customer routings.\* (Id.) As the Order on Remand observed, the competitive structure of the international

Under the old formula, a carrier whose routed traffic already exceeded its quota for a particular formula category had an incentive to continue to seek additional routings in that category. Although the carrier would not be rewarded with additional unrouted traffic, as is the case under the new formula, it would at least be able to keep any additional routed traffic it could obtain. (Of course, the carrier's continued success in obtaining routing would further increase its competitors' deficiencies, which might in the long run penalize the successful competitor if it were unable to continue to fill its quota through routed traffic alone).

communications industry has encouraged the carriers to provide the public with the best possible service at reasonable rates.

(SJA-964)

Thus, in adopting the new formula the FCC was not experimenting with competition in an industry where no competition had previously been present, but was instead merely removing arbitrary restrictions on existing competition, in an industry where competition has always been the rule and has been demonstrated by experience to serve the public. As the FCC stated in its Reconsideration Order:

We note that, quite apart from any action on our part, competition is a fact of the history of the international record industry and pre-dates the organization of this Commission. Our Initial Order, therefore, merely recognizes, as it reasonably must, that such competition exists. Our decision did not increase the facilities or service points of any carrier; but merely removed the arbitrary penalty placed upon the carriers by which their efforts to obtain traffic are hullified by an equivalent loss of unrouted traffic.

The public's interest in the formula matter is its general interest in having available to it a rapid, efficient communications service with adequate facilities at reasonable charges. See 47 U.S.C. 152. Our Initial Order merely observed that in our experience competition has been an effective way to achieve those ends and that, absent compelling circumstances such as those in 1943, we see no reason to penalize competition which already exists. (JA-72-73)

The FCC's decision to reward, rather than punish, successful competition through the new formula is neither arbitrary

nor capricious but is instead a well-reasoned exercise of the FCC's policy-making discretion, and the Commission's decision should be affirmed by this Court.

B. The Court Should Reject RCA Globcom's Suggestion That It Substitute Its Own Assessment of the Public Interest For The Judgment of the Commission.

RCA Globcom invites the Court to find that "substantial evidence demonstrates that implementation of the interim formula has disserved the public interest."\* Assuming that the so-called "substantial evidence" test is the statutory standard against which the Commission's decisions should be measured on appeal (and RCA Globcom is itself doubtful that such is the case\*\*), the Court's function is not, as RCA

<sup>\*</sup> The quotation is taken from the heading of Point I of RCA Globcom's Post Remand Brief, at p. 37.

<sup>\*\*</sup> See RCA Globcom's Post Remand Brief, p. 38, n. \*. Ordinarily, the standard for judicial review of an administrative decision is whether the agency's actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. \$706(2)(A). The substantial evidence test is, by statute, applicable only to those administrative decisions which must be made after a formal evidentiary hearing. See, 5 U.S.C. \$706 (2)(E); Camp v. Pitts, 411 U.S. 138 (1973); National Nutritional Foods Ass'n. v. Weinberger, 512 F.2d 688, 700-01 (2nd Cir. 1975), cert. den., 423 U.S. 827 (1975). Since the Court held in its original opinion in this case that the FCC could amend the international formula after informal notice-and-comment procedures, and need not hold a formal evidentiary hearing, it follows from 5 U.S.C. \$706 that the "arbitrary and capricious" test, rather than the "substantial evidence" test, is the standard applicable to the FCC's decisions.

Globcom's brief suggests, to decide what the evidence before the agency demonstrates:

"For a reviewing court to substitute its judgment on a factual issue for that of the agency is a usurpation of the prerogative and duty of that body."

WEBR, Inc. v. F.C.C., 420 F.2d 158, 162 (D.C. Cir. 1969).

While a reviewing court may properly satisfy itself that there was evidence before the agency "which a reasonable mind might accept as adequate to support" the agency's decision,\* "the narrow scope of appellate review does not permit the court to weigh the evidence and make factual findings of its own." Widing Transportation, Inc. v. I.C.C., 545 F.2d 652, 660 (9th Cir. 1976), cert. den., U.S. (1977).\*\*

"The inferences to be drawn from the evidence presented [to the agency] is peculiarly a matter for agency expertise...,"

Alabama Power Co. v. F.P.C., 482 F.2d 1208, 1221 (5th Cir. 1973), and "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative

<sup>\*</sup> Diamond King Ranch, Inc. v. Morton, 531 F.2d 1397, 1404
(10th Cir. 1976), citing Consolidated Edison Co. v. Labor
Board, 305 U.S. 197, 229 (1938). The substantial evidence
standard has also been analogized to the test which is
applied to determine whether a court should refuse to
direct a verdict in a jury trial. Illinois Central
Railroad Co. v. Norfolk & Western Ry. Co., 385 U.S. 57,
66 (1966).

<sup>\*\*</sup> And see, C. A. White Trucking Co. v. United States, 555 F.2d 1260, 1264 (5th Cir. 1977):

<sup>&</sup>quot;We do not sit as a trier of fact, and it is not our function to weigh the evidence pro and con."

agency's finding from being supported by substantial evidence."

Consolo v. F.M.C., 383 U.S. 607, 620 (1966). In short, in applying the substantial evidence test, the Court should give "proper respect to the expertise of the administrative tribunal." (Id.)\*

RCA Globcom does not assert that the quantum of factual data before the FCC was insufficient to support the Order on Remand, and its argument is therefore not, properly speaking, an argument that the FCC's decision was unsupported by substantial evidence. Instead, RCA Globcom is asking the Court to reverse the factual inferences and policy decisions which the FCC made when it rejected RCA Globcom's arguments that the new formula did not serve the public interest. With respect to each argument that RCA Globcom raised against the new formula, the FCC assumed that the factual allegations RCA Globcom made might be true, but found that the public interest inferences to be drawn from those assumed facts were different than those which RCA Globcom had proposed.

Thus the FCC assumed that RCA Globcom might be motivated by the new formula to increase its marketing

<sup>\*</sup> See also, Illinois Central Ry. Co. v. Norfolk & Western Ry. Co., supra; Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951); Diamond Ring Ranch, Inc. v. Morton, supra; Deutsch v. A.E.C., 401 F.2d 404, 407 (D.C. Cir. 1968).

efforts,\* but found that this was not an adequate reason for abandoning the new formula because (a) its expert knowledge of the communications industry led it to expect that RCA Globcom's increased marketing efforts would ultimately result in attempts to improve the quality of its service to the public and (b) any additional marketing expenditures made by RCA Globcom would affect the public interest only if the quality of RCA Globcom's services were diminished as a result of the attendant financial burden, and there had been "no indication" in RCA Globcom's pleadings that "the quality of the service it provides would suffer in any way by retention of the interim formula."\*\* (SJA-958, 961)

[Footnote continued on next page]

The FCC expressed doubt that the magnitude of the increase in RCA Globcom's marketing expenditures would be as large as RCA Globcom predicted. The FCC's observations were hardly arbitrary or capricious, since (1) RCA Globcom's predictions were apparently based on the assumption that the all-routed formula would be adopted, necessitating a "nationwide" promotional campaign, and (2) none of the other carriers (including WUI, which like RCA Globcom opposed the new formula) had indicated that they anticipated significant increases in their marketing expenditures.

The FCC's holding that RCA Globcom's economic hardship is not a matter of public concern, unless RCA Globcom's ability to serve the public is diminished as a result, is mandated by the case law. See, e.g., F.C.C. v. Sanders Bros. Radio Station, 309 U.S. 470 (1940); WLVA, Inc. (WLVA-TV), Lynchburg, Va. v. F.C.C., 459 F.2d 1286, 1292-97 (D.C. Cir. 1972) and the cases cited therein, principally Carroll Broadcasting Co. v. F.C.C., 258 F.2d 440 (D.C. Cir. 1958).

Similarly, the FCC accepted as a fact RCA Globcom's assertion that the new formula had shifted a <u>de minimis</u> amount of traffic from "direct" to "indirect" circuits, but (a) decided, as a policy matter, that the public interest in providing the smaller IRCs with a full and fair chance to compete outweighed any detriment which might result from a small shift of traffic between "direct" and "indirect" circuits, and (b) inferred, from its knowledge of the industry, that the problem was not as severe as RCA Globcom suggested, because it

[Footnote continued from previous page]

RCA Globcom suggests in this Court that its increased marketing effort will be detrimental to the public because its increased expenditures will necessarily result in higher tariff rates for telegraph service. RCA Globcom's argument rests on two unsubstantiated assumptions: (1) that the FCC would find such a rate increase justified, see Communications Act, Sections 201 and 204, 47 U.S.C. §§201, 204, and (2) that RCA Globcom's competitors would be in similar need of a rate increase, since RCA Globcom cannot raise its rates if it will be priced out of the market as a result. There is nothing in the record to indicate that the other IRCs will match RCA Globcom's increases in marketing expenditures, and therefore there is no reason to assume that they would join RCA Globcom in seeking a rate increase. Nor is their any reason for the Court to question the FCC's expert assessment that the competitive incentives of the new formula will result in efforts to improve service to the public rather than increased advertising expenditures.

expected the smaller carriers to apply for authority to provide direct circuits if they were successful competitors under the new formula. (SJA-958-59)

Finally, the FCC also assumed that RCA Globcom was correct, as a factual matter, when it pointed out that the new formula encouraged the carriers to concentrate their marketing efforts on the knowledgeable business customer who already "routed" its international telegrams. However, the FCC concluded that this fact was not a reason for rejecting the new formula, because the service improvements which would be made by the carriers to win the business of knowledgeable users would achieve the Commission's goal of providing the best possible service to all customers, since the international telegraph facilities which would be improved were used for both routed and unrouted traffic. (SJA-959-60)

In short, RCA Globcom is not complaining that the FCC's decision is unsupported by substantial evidence, or even that disputed factual issues were erroneously resolved against it. Instead, RCA Globcom is questioning the policy decisions which the FCC made on the basis of factual premises which, for the most part, were not in dispute.\* As the Court has

[Footnote continued on next page]

<sup>\*</sup> The only factual finding of the FCC which RCA Globcom questions as such is the FCC's finding that the improvements which ITT Worldcom has made in its international telegraph

recognized, the Commission must be given considerable deference on such questions of policy:

"Some of the parties have also pointed out [alleged] inconsistencies in the reasoning of the Commission, and assumed that we, as a court, are competent to review these alleged inconsistencies of policy statement and substitute our judicial judgment for the policy conclusions of the Commission.

# [Footnote continued from previous page]

service since the new formula has been in effect were motivated at least in part by the competitive incentives created by the new formula. RCA Globcom does not question whether these improvements were in fact made, but challenges the FCC's inference that they were motivated by the new formula.

The FCC's finding that ITT Worldcom's technical improvements were motivated by the new formula is not of major significance to its decision. The FCC's policy determination that the competitive incentives of the interim formula would promote service improvements is based primarily on the FCC's expert knowledge of the industry, and it viewed the ITT Worldcom improvements merely as preliminary evidence which tended to confirm its expectations. While RCA Globcom disputes the FCC's assessment of the significance of ITT Worldcom's actions, the cases cited, supra, demonstrate that it is for the Commission, rather than the Court, to weigh the evidence. Since all the IRCs used their international circuits to carry a number of different communications services in addition to message telegraph service, it is concededly difficult (even for ITT Worldcom) to assess the extent to which the technical changes in question are attributable to the competitive stimulus of the new formula, rather than the competitive pressures associated with ITT Worldcom's other communication services. However, the fact that this assessment is difficult is no reason for the Court to substitute its judgment for that of the Commission, whose administrative expertise makes it best able to weigh the significance of the evidence.

"The answer is simply that the priority of competing public values is not decided either by legislatures or agencies through hard logic. A choice between two valid reasons for action does not result in a non-reason. Public policy is not like a single track where only one train can run at a time. 'The court's responsibility is not to supplant [a] Commission's balance of . . . [competing] interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors.' National Ass'n. of Indep. Tel. Prod. & Distrib. v. F.C.C., supra, 516 F2d. at 541, 542 (citation omitted). The Court should reject RCA Globcom's invitation to review the

Commission's policy determinations in the guise of applying the "substantial evidence" test.

Point II - The New Formula Is Justified On The Additional Ground That It Is More Equitable Among the Carriers Than the Old Formula.

Even if the FCC had not properly decided that the new formula would better serve the public interest than the old, the Commission's Order on Remand should be affirmed because the new formula has been found by the FCC to be a more equitable means than the old formula of distributing unrouted traffic among the IRCs.

In its decision on rehearing, the Court properly observed that Section 222(e)(3) requires the Commission to consider equity to the carriers, as well as the public interest, when it prescribes a new international formula:

"The 1943 formula did not create a contract in perpetuity apportioning revenues and did not relieve the FCC of its statutory duty to prescribe a 'just, reasonable, equitable, and in the public interest' formula. Assuming 'public interest' is eliminated as not adversely affected, mathematical subtraction still requires the FCC to cope with the remaining first three requirements." 563 F.2d at 2-3 (SJA-947-48).

Although RCA Globcom and the Commission disagree as to whether the new formula will actually improve the quality of the carriers' international telegraph service, no carrier has suggested that its service to the public will be adversely affected by the new formula.\* The possible detrimental effects of the all-routed formula, which might have disrupted "the convenient service through Western Union to which the public has become accustomed" (SJA-951), are no longer a factor, since the FCC has abandoned further consideration of the "all-routed" approach. As the Court pointed out on rehearing, with all-routed plans "eliminated", the equitable division of unrouted traffic among the IRCs "would appear to be the primary issue." 563 F.2d at 3 (SJA-948).

The FCC has properly found that the new formula is equitable to the carriers because it gives each IRC an

<sup>\*</sup> The Order on Remand expressly noted that RCA Globcom made no such claim. (SJA-961)

equal opportunity to share in the "pool" of unrouted traffic by competing successfully for customer routings. No carrier is given any artificial preference or advantage. No carrier will be unfairly penalized if future changes in customer preference or market conditions work to its competitive advantage, since any such changes will be reflected in the periodic updatings of the carriers' allocations which are contemplated by the new formula. It was neither arbitrary nor capricious for the FCC to conclude that the new formula, with these attributes, is more equitable than the old formula, which had given RCA Globcom a permanent claim to a disproportionate share of unrouted traffic for reasons no more compelling than the fact that RCA Globcom had enjoyed a large share of a differently structured market over thirty years ago, and which had denied carriers like ITT Worldcom a fair reward for their competitive success.

RCA Globcom quarrels with the FCC's conclusion that the new formula is equitable, but it cannot satisfactorily explain why it should continue to be guaranteed a disproportionate share of unrouted traffic. In essence, RCA Globcom is arguing that it should be permitted to maintain the favored status which the old formula gave it merely because it has enjoyed that status for the past thirty years. The argument that the old formula gives RCA Globcom a perpetual right to a

guaranteed share of international telegraph traffic has been properly rejected by both the FCC (SJA-961-62) and this Court:

"Although the purpose of the 1943 formula was to freeze the shares of industry participation because of the potentially unique situation created by the merger [of Western Union and Postal], that purpose cannot be stretched to giving RCA a right in perpetuity to a fixed share of the telegraphic market regardless of changing conditions and circumstances. It certainly could not have been the intention of the Congress or the FCC to permit RCA to sit back and do nothing to counteract tactics by its competitors and rely upon the 'formula' to give it the lion's share of the unrouted business." 563 F.2d at 2 (SJA-947).

As noted previously,\* RCA Globcom's argument that Section 222(e)(3) gives it some sort of contractual interest in the old formula, is inconsistent with both the language and the legislative purpose of that statute. RCA Globcom's Post-Remand Brief fails to articulate any ground on which the Court may properly set aside the FCC's finding that the new formula is more equitable than the old,\*\* and the Order on Remand should be affirmed for this reason alone.

[Footnote continued on next page]

<sup>\* &</sup>lt;u>See</u> p. 6, n. \*, <u>supra</u>.

<sup>\*\*</sup> Two subsidiary arguments raised by RCA Globcom may be answered briefly. First, RCA Globcom argues that the FCC has failed to articulate the policy reasons which led it to replace the old formula with the new. RCA Globcom Post Remand Brief, pp. 46-47. However, the FCC

Point III - On Remand, the FCC Properly Followed
The Procedures Which the Court Had
Suggested.

The final point of RCA Globcom's Post-Remand Brief is an argument that the additional proceedings which the FCC undertook on remand were inadequate. However, the FCC did precisely what the Court directed it to do in its rehearing decision (SJA-948): the Commission directed the parties to submit any additional written comments they might have within

[Footnote continued from previous page]

clearly explained that its actions were motivated (1) by changes in the structure of the international telegraph industry (such as the Western Union divestiture and the increase in gateway-originated routed traffic) which made the balancing provisions of the old formula unworkable, unfair and unnecessary and (2) to an extent, by changes in the FCC's perception of how the public interest may best be served. The case law requires nothing more. See, e.g., Environmental Defense Fund, Inc. v. E.P.A., 510 F.2d 1292, 1299 (D.C. Cir. 1975); Greater Boston Television Corp. v. F.C.C., 444 F.2d 841, 852 (D.C. Cir. 1970), cert. den., 403 U.S. 923 (1971); City of Chicago v. F.P.C., 385 F.2d 629, 637 (D.C. Cir. 1967), cert. den., 390 U.S. 945 (1968).

Secondly, RCA Globcom complains that the FCC did not find that its international telegraph service was inadequate before altering the old formula. Such a finding would obviously go to the public-interest justification for the new formula rather than to its equity among the carriers, and is in any event unnecessary. The FCC's statutory mandate is to provide the public with the best possible service, not merely adequate service. See, Western Union Division v. United States, 87 F. Supp. 324, 335 (D.D.C. 1949), aff'd., 338 U.S. 864 (1949). Therefore, the FCC need not find that existing service is inadequate before taking steps, such as those at issue here, which are intended to improve service further. Washington Utilities & Transp. Comm'n. v. F.C.C., supra, 513 F.2d at

30 days so that the FCC could adopt its Order on Remand within the 60 day period which the Court had suggested was an appropriate time for the Commission to reach its decision.

Although RCA Globcom now complains in this Court that the FCC should have solicited an additional series of comments after receiving the carriers' post-remand pleadings, it never asked the FCC to undertake any further proceedings on remand other than the single round of comments which the Court had directed.\* Since RCA Globcom failed to request additional administrative proceedings from the FCC on remand, it has waived its right to contest the adequacy of the Commission's post-remand procedures in this Court. Communications Act, Section 405, 47 U.S.C. \$405; Allianza Federal de Mercedes v. F.C.C., 539 F.2d 732, 738-739 (D.C. Cir. 1976); Neckritz v. F.C.C., 502 F.2d 411, 417 (D.C. Cir. 1974); Gross v. F.C.C., 480 F.2d 1288, 1290 n. 5 (2nd Cir. 1973).

Nor is it apparent, as RCA Globcom suggests, that the FCC would have rejected a timely request for an opportunity to submit additional comments or arguments. The FCC's letter to the carriers of October 7, 1977 (SJA-972-973), which solicited their post-remand comments, indicated only that the FCC would not extend the period for filing the first round of comments (so that the FCC could meet the Court's 60-day deadline for reaching its decision). That letter did not address the question of what the FCC would have done if RCA Globcom had suggested, after the carriers' comments were submitted, that additional procedures were necessary to afford it an adequate hearing.

Moreover, in assessing the adequacy of the FCC's procedures, the Court should not look merely to the agency's actions following remand, but should instead consider the entire administrative history of this lengthy proceeding, which has now been pending for over thirteen years. Innumerable comments have been filed with the FCC by the interested parties, and several detailed statistical studies of the international telegraph industry have been undertaken. The parties have all been heard, the issues have all been thoroughly ventilated, and the FCC, with this Court's guidance, has considered all factors relevant to its decision. There comes a point when administrative proceedings must come to an end, and a final decision must be made. That point has now been reached, and the FCC's Order on Remand should be affirmed by the Court.

### CONCLUSION

For the reasons stated above, and in ITT World-com's principal brief (submitted November 19, 1976),\* the Petition for Review should be denied.

Respectfully submitted,

LeBOEUF, LAMB, LEIBY & MacRAE
Attorneys for Intervenor
ITT World Communications Inc.
Office and P.O. Address
140 Broadway
New York, New York 10005
(212) 269 1100

#### Of Counsel:

Grant S. Lewis, John S. Kinzey,

and

Howard A. White, John A. Ligon, ITT World Communications Inc. 67 Broad Street New York, New York 10005 (212) 797 3300

As Point III of its Post-Remand Brief, RCA Globcom renews, by reference, the arguments of its earlier briefs that the Commission erred when it found the old international formula no longer met the statutory standards of Section 222(e). It should be apparent merely from the statement of the case, supra, pp. 9-12, that the FCC's findings in this regard were neither arbitrary, capricious, nor an abuse of discretion. However, to the extent the Court deems it necessary to consider RCA Globcom's prior arguments further, those arguments are answered at pp. 40-44 of ITT Worldcom's previous brief.

## CERTIFICATE OF SERVICE

1. I am an attorney associated with the firm of LeBoeuf, Lamb, Leiby & MacRae, attorneys for Intervenor, ITT World Communications Inc.

2. I hereby certify that the attached Supplemental Brief After Remand of Intervenor ITT World Communications
Inc. has this day been served on all parties to this proceeding.
At my direction, copies of the brief were delivered by hand to the following persons at the listed addresses:

H. Richard Schumacher, Esq. Cahill Gordon & Reindel Attorneys for Petitioner RCA Global Communications, Inc. 80 Pine Street New York, New York 10005

Alvin K. Hellerstein, Esq. Stroock, Stroock & Lavan Attorneys for Intervenor Western Union International, Inc. 61 Broadway New York, New York

3. Copies of the brief were mailed, first class mail, postage prepaid, to the following persons at the listed addresses:

Jack David Smith, Esq.
Attorney for Respondent
Federal Communications Commission
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Barry Grossman, Esq.
Attorney for Respondent
United States of America
Department of Justice
Washington, D.C. 20530

E. Edward Bruce, Esq.
Covington & Burling
Attorneys for Intervenor
TRT Telecommunications Corp.
888 Sixteenth Street, N.W.
Washington, D.C. 20006

March 20, 1978

John S. Kinzey